UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

TERRY CRAWFORD, **Plaintiff,** **v.** **LIFE INSURANCE COMPANY OF NORTH AMERICA and TOYOTA SALARY CONTINUATION PLAN,** **Defendants.**	**SACV 13-1019 AG (RNBx)** **[TENTATIVE] ORDER REVERSING ADMINISTRATOR'S DENIAL OF LONG TERM DISABILITY BENEFITS**

Plaintiff Terry Crawford, a former employee of Toyota Motor Sales U.S.A., Inc. ("Toyota") filed this lawsuit under the Employee Retirement Income Security Act of 1974 ("ERISA"), seeking disability benefits under a plan ("the Plan") governed by ERISA and administered by Life Insurance Company of North America ("LINA" or "Defendant"). Plaintiff applied for short-term disability ("STD) benefits and long-term disability ("LTD") benefits under the Plan because of allegedly disabling chronic pain, but LINA denied his claims. Plaintiff and Toyota have since settled his STD claim, so this appeal only concerns the denial of Plaintiff's claim for LTD benefits.

After reviewing the Administrative Record, and considering all arguments and

evidence presented, the Court concludes that Plaintiff is entitled to LTD benefits under the Plan. But because the Plan limits the extent of benefits available for disabilities caused by subjective symptoms, and Plaintiff argues that his disabilities are caused by subjective symptoms, Defendant is only required to award Plaintiff a maximum of 24 months of LTD benefits.

FINDINGS OF FACT

After reviewing and evaluating all the evidence in the administrative record, the Court makes the following findings of fact. To the extent any finding of fact should more properly be designated a conclusion of law, it should be treated as a conclusion of law. Similarly, to the extent any conclusion of law should more properly be designated a finding of fact, it should be treated as a finding of fact. All citations, unless otherwise noted, are to the administrative record.

1. THE PLAN

At all times relevant to this lawsuit, Plaintiff was an employee of Toyota, which maintains an employee welfare benefit plan governed by ERISA. The Plan provides for both short term disability benefits, which are self-funded by Toyota but administered by LINA, and long term disability benefits, which are insured and administered by LINA. This case concerns only Plaintiff's denied claim for LTD benefits.

1.1 Qualification for LTD Benefits

LTD benefits under the Plan are subject to LINA's Group Long Term Disability Policy. The Plan defines disability as follows:

> An Employee is Disabled if, because of Injury or Sickness,
> 1. he or she is unable to perform the material duties of his or her regular occupations, or solely due to Injury or Sickness, he or she is unable to earn more than 80% of his or Indexed Covered Earnings; and
> 2. after Disability Benefits have been payable for 24 months, he or she is unable to perform the material duties of any occupation for which he or she may reasonably become qualified based on education,

> training or experience, or solely due to Injury or Sickness, he or she is unable to earn more than 80% of his or her Indexed Covered Earnings.

(AR 3770.)

Thus, for the first two years after the employee claims disability, the claimant is eligible for benefits if he is unable to work in his "regular occupation." After the first two years, the claimant is eligible for benefits if he is unable to work in "any occupation" for which he may reasonably become qualified. In this appeal, which was filed and briefed during the first two years, the only issue is whether Plaintiff is unable to work in his own "regular occupation" at Toyota.

The Plan further provides that, before any LTD benefits are payable, the claimant must be continuously disabled during a "Benefit Waiting Period," which is one year. (AR 3770.) Thus, in this appeal, Plaintiff must prove continuous disability from September 2011, when he first claimed total disability, to September 2012.

1.2 Subjective Symptoms Limitation

The Plan contains a limitation concerning certain types of disabilities, including those caused by subjective symptoms. The Plan pays disability benefits "on a limited basis for a Disability caused by, or contributed by, . . . Subjective Symptom conditions (such as headaches, dizziness, pain, and Chronic Fatigue syndrome, etc.)." (AR 3774.) A subjective symptom condition is defined as "any physical, mental or emotional symptom, feeling or condition reported by the employee or his physician which cannot be verified by tests, procedures or clinical examinations conforming to generally accepted medical standards." (AR 3774.) The Plan only pays 24 months of benefits for disabilities falling under limitation.

2. PLAINTIFF'S OCCUPATION AND WORK HISTORY

Plaintiff Terry Crawford is a man in his fifties, born in 1959. He worked for Toyota from July 2005 to September 2011. His job title when he left Toyota was "Technology Manager Senior," a position that manages teams to "apply technology to

business processes." (AR 519–23.) The position is a sedentary one, requiring sitting for most of the day but allowing for short hourly breaks. (AR 18, 444.)

Plaintiff stopped working on September 6, 2011, on the recommendation of Dr. Zepeda, a pain management specialist who had been treating Plaintiff for several years. (AR 5, 188–89, 454.) On October 7, 2011, Toyota extended his leave of absence to January 16, 2012, which Plaintiff requested so that he could complete an intensive pain management program. Plaintiff stated that he was "optimistic" that the program would "get [him] back to work," and that he "plan[ned] on coming back and again being productive for [Toyota]." (AR 1497–98.) But Plaintiff never returned to work.

3. PLAINTIFF'S DISABILITY AND MEDICAL HISTORY

3.1 Before Leaving Toyota

Plaintiff had his first lumbar spine surgery 1975—a laminectomy and fusion L4 through S1—after a football injury in high school. (AR 774–75.) His lower back pain became severe in October 2007, also radiating down his legs. (AR 774.) He received facet blocks in 2008, but that did not help his pain. (AR 774.) Plaintiff had an L2-3 laminectomy and microdiskectomy in December 2008, but he reported that his pain increased after surgery. (AR 774.) He had several epidurals in the year following surgery, but each one provided relief for at most a little over a week. (AR 774.) Plaintiff also took, and continues to take, multiple daily doses of a variety of strong opioid painkillers prescribed by his doctors. (*See* AR 551, 774.)

In January 2010, Plaintiff underwent a spinal cord stimulator trial to help manage his pain, after which Plaintiff reported a 60 percent reduction in pain and 50 percent reduction in opioid consumption. (AR 731.) Even then, Plaintiff reported constant pain, with pain at worst 8 out of 10, at best 2 out of 10, and with an average of 4 out of 10; made worse by bending or prolonged sitting or standing, and made better by rest and medication. (AR 731.) Before using the stimulator, Plaintiff had reported average pain of 6 out of 10. (AR 454.) On March 8, 2010, after the trial run with a stimulator, Plaintiff had a spinal cord stimulator surgically implanted by Dr. Zepeda. (AR 1221–23.)

3.2 After Leaving Toyota

On the recommendation of Dr. Zepeda, Plaintiff stopped working on September 6, 2011. (ER 455.) In November 2011, a medical team approved Plaintiff for an intensive nine-week chronic pain program. (AR 1038.) Around that time, Plaintiff's spinal cord stimulator malfunctioned, causing increased pain near the stimulator. (AR 1140.) Dr. Zepeda surgically removed the stimulator on December 16, 2011. (AR 1105.) Plaintiff missed some days of the chronic pain program in December because of aggravated pain and the surgical removal of the spinal stimulator, but he then resumed the program. (AR 1021, 1027.) Plaintiff also visited other doctors, such as Dr. Nitin Bhatia, M.D., throughout 2012. (*See, e.g.*, AR 455.)

On July 22, 2012, Plaintiff underwent a four-hour Functional Capacity Evaluation ("FCE") at Allegro Physical Therapy. (AR 2569–74.) The physical therapists conducting the FCE observed a maximum sitting tolerance of 20 minutes and a dependable sitting tolerance of 12 minutes, maximum and dependable standing tolerances of 28 and 20 minutes, and a walking tolerance of 17 minutes. (AR 2571–72.) Plaintiff told the physical therapist he is able to sit for up to 75 minutes, though the physical therapist did not observe that long of a sitting tolerance during the FCE. (AR 2571.) The physical therapist observed that Plaintiff "demonstrated a consistent pattern of behaviors and symptoms that correlated closely with his history of injury," "appeared to put forth his best effort," and that the physical therapists' report thus "accurately represents his current functional capabilities." (AR 2570.) She opined that it seemed "improbable for Mr. Crawford to be able to return to his full time position of employment even with accommodations for positional changes and productivity." (AR 2754.)

3.3 Opinions of Plaintiff's Physicians

In a series of letters written during 2012, Dr. Zepeda opined that Plaintiff would not be able to work at his current job because of his condition. In a letter dated May 21, 2012, Dr. Zepeda wrote that it was "unrealistic for Mr. Crawford to return to his current employment," noting that Plaintiff will "require indefinite medical and pharmacological

management for his chronic pain condition to maintain a tolerable pain existence." (AR 551.) In a July 11, 2012, letter, Dr. Zepeda wrote: "I recommend patient not return back to full time work because his duties severely exacerbate his pain requiring him to rely more heavily on his opioid therapy. He is to avoid any prolonged sitting, standing (over 15-30 minutes) and stressfull [sic] situations, as this would exacerbate his chronic pain condition." (AR 553.) In a "statement under oath" taken by Plaintiff's lawyers on February 8, 2013, Dr. Zepeda elaborated that, based on his observations of Plaintiff during examinations, he found Plaintiff's accounts of his level of pain to be credible. (AR 3371–78.)

Dr. Bhatia, one of Plaintiff's other treating physicians, expressed an opinoin similar to Dr. Zepeda's. In a letter dated March 6, 2013, Dr. Bhatia wrote that published data shows that the majority of patients with failed spinal surgery and an associated inability to work never return to work, and that Plaintiff has more severe problems than most people in those studies. (AR 3386–89.)

3.4 Opinions of Defendants' Medical Consultants

During the claims process, Defendant had multiple nurses and doctors review Plaintiff's medical files and opine on his disability claim. None of these medical consultants examined Plaintiff.

Several nurse consultants reviewed Plaintiff's medical files at Defendant's request. They found a lack of evidence showing that Plaintiff had measured limitations. (*See* AR 36, 134–35, 152–53, 171–72.) One nurse, for example, concluded that "[c]urrent information does not support restrictions as evidenced by no measures of limitations." (AR 152–53.)

Dr. John Mendez, M.D., who is board certified in occupational medicine and internal medicine, also reviewed Plaintiff's medical files. He concluded that despite the "FCE in July 2012 showing significant measured functional deficits from that date forward, there remains no continuous time-concurrent documentation of significant measured physical or cognitive limitations from 9/6/11 to 9/10/12." (AR 110–12.) In

other words, while Dr. Mendez acknowledged that the FCE was evidence of disability from that date on, he didn't believe it supported a finding of disability dating back to the initiation of Plaintiff's disability claim. (*See* AR 3413.)

Dr. Navneet Gupta, M.D., a physician board-certified in physical medicine and rehabilitation, also reviewed Plaintiff's claim for Defendant. Gupta noted that the FCE report "mentions good validity, hence Mr. Crawford did provide adequate effort to objectively measure to some degree the tolerances from such a protracted course of illness." But he nonetheless concluded that there were no restrictions on Plaintiff's ability to work, and that rest breaks of 5–10 minutes would be reasonable limitations. Dr. Gupta came to this conclusion based on a "compromise" between the observed limitations of the FCE, which found a maximum sitting tolerance of 20 minutes, and Plaintiff's statement to the physical therapist during the FCE that he could sit for up to 75 minutes. (*See* AR 412–21.)

Larry Featherston, Ph.D., C.R.C., a rehabilitation specialist, opined that, based on the restrictions identified by Dr. Gupta, that Plaintiff could perform the duties of his own occupation. He noted that a technology manager is a sedentary position according to the Dictionary of Occupational Titles, which allows for "sit/stand postural changes." (AR 17–19.)

4. PLAINTIFF'S CLAIMS

4.1 STD Claim

After Plaintiff's last day of work in early September 2011, he initiated his claim for STD benefits. (AR 188–89.) Defendant denied his claim, stating that it had not "received sufficient clinical Objective Medical Evidence to substantiate limitations and restrictions to support a continuous inability in performing your occupation as a Technical Manager." (AR 263–65.)

Plaintiff appealed, which Defendant denied. Defendant stated that although the July 2012 FCE showed "significant measured functional deficits from that date forward," there was not documentation of significant limitations dating back to September 2011.

(AR 271–73.)

Defendant later notified Plaintiff that benefits for his STD claim were approved from December 16, 2011, though January 12, 2012, the weeks following his surgery to remove his spinal stimulator. (AR 266.) Plaintiff again appealed the denial of STD benefits outside of that date range, and Defendant again denied him benefits. Defendant based its decision on the opinions of Dr. Gupta and Dr. Featherston, concluding that positional changes every hour would accommodate Plaintiff's condition and that his job allowed for such changes. (AR 248–50.)

4.2 LTD Claim

In September 2012, while his STD appeal was pending, Plaintiff filed his claim for LTD benefits. (AR 3418–28.) Defendant denied the claim, stating that "the medical records do not provide documentation of functional deficits by clinically measureable [sic] testing to support your inability to work." (AR 220–23.)

Plaintiff appealed the denial of his LTD benefits, but Defendant denied the appeal. As with the denial of his final STD appeal, Defendant relied on the opinions of Dr. Gupta and Dr. Featherston. (AR 206–09.)

CONCLUSIONS OF LAW

1. MOTIONS TO ALTER THE ADMINISTRATIVE RECORD

Plaintiff has filed two motions to alter the administrative record. (Motion to Strike, Dkt. No. 42; Motion to Augment the Record, Dkt. No. 43.) The Court DENIES both motions.

1.1 Motion to Augment the Record

Plaintiff filed a "Motion to Augment the Record with Documents Related to His Award of Social Security Disability Insurance Benefits." (Motion to Augment the Record, Dkt. No. 43.) Plaintiff wants to add to the administrative record the decision of a Social Security Administration administrative law judge awarding him disability benefits under the Social Security Act ("SSA"), as well as the associated notice of decision and notice of

award.

In applying a de novo review of the decision of a plan administrator, in most cases a district court relies only on evidence in the administrative record. *Opeta v. Nw. Airlines Pension Plan for Contract Employees*, 484 F.3d 1211, 1217 (9th Cir. 2007). The district court may review extrinsic evidence "*only* when circumstances *clearly establish* that additional evidence is *necessary* to conduct an adequate de novo review of the benefit decision." *Id.*

Plaintiff has not demonstrated that the SSA decision is necessary to conduct an adequate de novo review. Plan administrators under ERISA are not required to consider SSA awards in making disability determinations. *See Madden v. ITT Long Term Disability Plan for Salaried Employees*, 914 F.2d 1279, 1285 (9th Cir. 1990). Further, it is not clear how the SSA decision would even be helpful in this case. Any persuasive value of that opinion is limited, because determinations of disability under the SSA and ERISA are governed by different substantive legal standards. *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 830–34 (2003) (holding that, among the substantive differences between an ERISA and an SAA disability determination, is that ERISA determinations need not accord special weight to the opinions of a treating physician). In this case, the administrative law judge gave great weight to the treating physician's opinion, as it must, but that is not required of this Court. And whether or not any additional evidence underlying the SSA opinion may have been helpful, Plaintiff does not seek adding any such evidence to the record, just the opinion itself.

In his Reply brief, Plaintiff points to a regulatory settlement between Defendant and the California Department of Insurance, where Defendant stated that an SSA award "will be given significant weight under certain circumstances" and "can be highly relevant to the Disability analysis." (AR 349.) But Plaintiff does not sufficiently explain the significance of this settlement to this litigation or why, in the particular circumstances of this case, the SSA award should be given any weight. Further, Plaintiff only raises this issue in its Reply, which deprives Defendant of an opportunity to respond. *See United*

States v. $186,416.00 in U.S. Currency , 722 F.3d 1173, 1176 n.1 (9th Cir. 2013) (holding that arguments only made in reply may be deemed waived).

The Court DENIES the Motion to Augment the Record.

1.2 Motion to Strike

Plaintiff filed a "Motion to Strike Two of Defendants' Consultant Reports from the Administrative Record." (Motion to Strike, Dkt. No. 42.) Plaintiff asks the Court to strike the reports of Dr. Navneet Gupta (AR 412–30) and Dr. Larry Featherston (AR 17–19).

1.2.1 Report of Dr. Navneet Gupta

Plaintiff first argues that the report of Dr. Gupta should be struck because Dr. Gupta failed to review Dr. Zepeda's "statement under oath," before making his report. But Plaintiff cites no authority supporting striking a report from the record for this reason. The cases Plaintiff cite reasoned that various consultant reports were flawed for failing to consider relevant portions of the medical record, but those courts did not strike the reports from the administrative record. *See Spangler v. Lockheed Martin Energy Sys.*, Inc., 313 F.3d 356, 362 (6th Cir. 2002); *Kochenderfer v. Reliance Standard Life Ins. Co.*, 2009 WL 4722831, at *6 (S.D. Cal. Dec. 4, 2009). Parts of Dr. Gupta's report may be less persuasive for having failed to consider the statement under oath, but Plaintiff hasn't demonstrated that a less persuasive report must be stricken from the record.

Plaintiff also argues in passing that Dr. Gupta lacked the relevant expertise to comment on Plaintiff's condition. But Plaintiff does not explain why he thinks Dr. Gupta isn't qualified. Dr. Gupta is board-certified in physical medicine and rehabilitation. (AR 420.) And even if Dr. Gupta were opining on matters beyond his expertise, that would go to the weight of his opinion but is not a basis to strike it from the record.

The Motion to Strike as to Dr. Gupta's report is DENIED.

1.2.2 Report of Dr. Larry Featherston

Plaintiff argues that Dr. Larry Featherston's report should be struck because it is based on Dr. Gupta's report. Again, even if Plaintiff were correct that Dr. Gupta's report was flawed, Plaintiff hasn't shown why striking Dr. Featherston's report (rather than

considering underlying flaws and discounting appropriately) is the proper remedy.

The Motion to Strike as to Dr. Featherston's report is DENIED.

2. STANDARD OF REVIEW

When a district court reviews a plan administrator's decision regarding ERISA benefits, the default standard of review is de novo. *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 963 (9th Cir. 2006) (en banc). Here, the parties have stipulated that the denial of LTD benefits should be reviewed de novo. (Joint Stipulation, Dkt. No. 31, at 1.)

"When conducting a de novo review of the record, the court does not give deference to the claim administrator's decision, but rather determines in the first instance if the claimant has adequately established that he or she is disabled under the terms of the plan." *Muniz v. Amec Const. Mgmt., Inc.*, 623 F.3d 1290, 1295–96 (9th Cir. 2010). In reviewing the decision de novo, the district court ordinarily relies solely on evidence in the administrative record. *Opeta v. Nw. Airlines Pension Plan for Contract Employees*, 484 F.3d 1211, 1217 (9th Cir. 2007). The claimant bears the burden of proving his entitlement to benefits. *Muniz*, 623 F.3d at 1294.

3. DISABILITY FROM PAIN

Plaintiff argues that he is unable to work because of severe lower back and leg pain, which is exacerbated by the extended periods of sitting required by his job. The primary reason Defendant gave Plaintiff for denying his disability benefits, and Defendant's main theory in this appeal, is that there isn't objective evidence showing that Plaintiff couldn't work because of that pain. The Court concludes that, given the terms of the Plan, the evidence Plaintiff presented sufficiently documented a disability entitling him to benefits.

If an insurer covers an illness, it cannot "condition[] an award on the existence of evidence that cannot exist." *Salomaa v. Honda Long Term Disability Plan*, 642 F.3d 666, 678 (9th Cir. 2011); *see also Saffon v. Wells Fargo & Co. Long Term Disability Plan*, 522 F.3d 863, 872–73 (9th Cir. 2008). Here, the Plan covers disabilities caused by subjective symptoms, defined as conditions that "cannot be verified by tests, procedures or clinical

examination," including disabilities caused by pain. (AR 3774.) Therefore, haveing decided to cover disabilities caused by pain, Defendant cannot refuse Plaintiff disability benefits simply for failing to produce evidence that doesn't exist for such a disability.

That does not mean that the insurance company must simply take a claimant at his word. For example, a "long history of treatment," or a lack thereof, may add or detract from the credibility of a claimant's subjective complaints. *See, e.g.*, *Diaz v. Prudential Ins. Co. of Am.*, 499 F.3d 640, 645–46 (7th Cir. 2007) (finding it improbable that the claimant "would have undergone the pain-treatment procedures that she did, which included not only heavy doses of strong drugs . . . but also the surgical implantation in her spine of a catheter and a spinal-cord stimulator, merely in order to strengthen the credibility of her complaints of pain and so increase her chances of obtaining disability benefits."). Objective evidence might contradict a claimant's account of her subjective symptoms. *See Langlois v. Metro. Life Ins. Co.*, 2012 WL 1910020 (N.D. Cal. May 24, 2012). And claimant's activities outside of work might be inconsistent with her subjective reports. See *Jordan v. Northrop Grumman Corp. Welfare Benefit Plan*, 370 F.3d 869, 880 (9th Cir. 2004) (finding that claimant's activities outside of work "cut against a determination of severe pain").

Here, however, the evidence is consistent with Plaintiff's complaints of chronic and severe pain. Plaintiff has a long history of spinal problems, which accounts for the source of the pain. The Court finds it unlikely that Plaintiff would elect to undergo repeated invasive surgeries, including the implantation of a spinal stimulator, if his pain wasn't severe. Nor does the Court find it likely that Plaintiff would regularly take a prescribed medley of potent painkillers just to increase his chances of obtaining a disability award. Plaintiff was accepted to and participated in an intensive pain management program, as one might expect from a person suffering from chronic pain. And all physicians and other medical personnel that actually treated Plaintiff found his reports of pain credible.

Defendant argues that Plaintiff must do more than show that he suffers from pain,

but must also show that he is unable to work because of his pain. The Court agrees that, under the terms of the Plan, Plaintiff is requiring to make that showing. (AR 3770.) *See also Jordan*, 370 F.3d at 877. Still, Defendant cannot deny Plaintiff's application for benefits because of a lack of objective proof when such objective proof cannot exist. *See Salomaa*, 642 F.3d at 678. Reviewing all the evidence in this case, the Court concludes that Plaintiff has carried his burden in establishing an inability to work because of the severity of his pain.

As the Court previously stated, Plaintiff's treating physicians found Plaintiff's reports of severe pain credible, and they consequently recommended he undergo repeated surgeries, take strong medications, and participate in intensive pain management sessions. Because of the severity of the pain, and because the pain was exacerbated by the extended sitting that his job required, his physicians concluded that Plaintiff should not work. Dr. Bhatia even stated that Plaintiff has more severe problems than most patients who are unable to work because of failed spinal surgery. (AR 3386–89.) The Court recognizes that the opinions of treating physicians as to disability are not definitive evidence, as they might be undermined by a lack of supporting evidence or contradicted by other evidence in the record. *See also Jordan*, 370 F.3d at 877. But when the opinions of those treating physicians are supported by other evidence, as they are here, they are at least entitled to some weight.

Also supporting Plaintiff's disability claim are the result of his Functional Capacity Evaluation. (AR 2569–74.) The physical therapists observed a maximum sitting tolerance of 20 minutes and a dependable sitting tolerance of 12 minutes, maximum and dependable standing tolerances of 28 and 20 minutes, and a walking tolerance of 17 minutes, and she concluded that it was "improbable for Mr. Crawford to be able to return to his full time position of employment even with accommodations for positional changes and productivity." (AR 2571–72, 2754.) Further, the physical therapist observed that Plaintiff "demonstrated a consistent pattern of behaviors and symptoms that correlated closely with his history of injury," and "appeared to put forth his best effort." (AR 2570.)

While an FCE is not a perfect measure of disability—it only measures tolerances at a particular point in time, and a claimant could attempt to game the evaluation—it seems that it is as close to an objective measure of limitations caused by pain as a claimant can get. Even Dr. Gupta, a physician hired by Defendant to review Plaintiff's file, concluded that Plaintiff "did provide adequate effort [during the FCE] to objectively measure to some degree the tolerances from such a protracted course of illness." (AR 429.) Dr. Mendez, another physician hired by Defendant to review Plaintiff's file, concluded that the "FCE in July 2012 show[ed] significant measured functional deficits from that date forward." (AR 3411.)

Dr. Mendez also concluded, on the other hand, that there was no documentation of significant physical limitations before the date of the FCE. Defendant cited his conclusion as a reason to deny benefits, as Plaintiff must be disabled for the entire Benefit Waiting Period. But in the absence of countervailing evidence, it is reasonable to infer that the limitations measured by the FCE existed before the date of the FCE. Plaintiff claimed disability benefits, Defendant denied his claim for lack of evidence of his limitations, and Plaintiff then obtained an FCE, which provided some documentation of his limitations. Under Defendant's logic, Plaintiff would seemingly have to obtain an FCE on the first day of disability leave or never recover at all. Under the circumstances, that doesn't strike the Court as reasonable.

Most of the medical personnel hired by Defendant to review Plaintiff's medical records concluded that Plaintiff was not entitled to benefits because of a lack of documented physical limitations. As the Court has stated, Plaintiff has presented sufficient documentation of his limitations, and Defendant cannot deny his award for not presenting objective evidence that doesn't exist for his type of disability.

The most significant evidence cutting against a finding of disability is a statement Plaintiff made to the physical therapist conducting his FCE that he can sit for up to 75 minutes. (AR 2571.) To reach his conclusion that Plaintiff could work if he switched positions every hour, Dr. Gupta "arrived at a compromise decision" between the

tolerances observed during the FCE and the 75 minute tolerance reported by Plaintiff. (AR 420.)

While Dr. Gupta apparently read Plaintiff's statement to mean that Plaintiff could regularly sit for up to 75 minutes, the evidence does not support that reading. The physical therapist observed a much shorter tolerance during the FCE, and she also observed "progressive degradation of his tolerance for work activity" over the course of the four-hour evaluation. (AR 2570.) In that context, the Court reads Plaintiff's statement to mean that he can at times sit for up to 75 minutes. But if more often he cannot sit for nearly that long, which all other evidence suggests, then the occasional ability to endure longer stretches is consistent with a disability that prevents Plaintiff from working.

In sum, Plaintiff appears to have provided as much evidence as one can to document the his disability and the limitations from it, and Defendant has not provided sufficient evidence to the contrary to outweigh that of Plaintiff. The Court concludes that Plaintiff has a documented inability to work because of the limitations associated with his chronic pain, which entitles him to an award of benefits under the Plan. The Court also concludes that the extent of these benefits is limited under the Plan, which is addressed in Section 5 of the conclusions of law.

4. DISABILITY FROM MEDICATION SIDE EFFECTS

Plaintiff seems to also argue that cognitive difficulties—side effects of his pain medications—also constitute a disability preventing him from working. This argument is not particularly well developed. Even while acknowledging that this Court is reviewing whether Plaintiff is disabled de novo, Plaintiff spends most of his briefing discussing LINA's purported errors in the claims process rather than making an affirmative case for disability. In the fact section of Plaintiff's Opening Trial Brief, however, Plaintiff references several documents discussing side effects from his medications, and Plaintiff cites several cases concerning disability from medications in two footnotes. (*See* Plaintiff's Opening Brief, Dkt. No. 41, at 14 n.7, 26–28, 31 n.9.) Assuming that Plaintiff intended to argue that he is disabled because of the medications he takes for pain, the

Court concludes that there is insufficient evidence to establish this sort of disability in the administrative record.

Plaintiff takes a variety of strong opioids to manage his pain. But notes documenting evaluations of Plaintiff do not show that these drugs have impacted his cognitive abilities to the point that he is unable to work. Gary Baffa, Ph.D., a clinical psychologist, conducted a psychological evaluation of Plaintiff as part of Plaintiff's pain management program. Dr. Baffa found that Plaintiff had "no evident developmental, cognitive, behavioral or cultural barriers to learning and communication." (AR 1379.) More specifically, Baffa noted that Plaintiff's memory was intact, that Plaintiff was "functioning within a normal age range of intelligence," and that "[c]oncentration, abstract reasoning and judgment appeared to be intact." (AR 1381.)

To support his argument that his medications are disabling, Plaintiff cites two documents. But the Court gives neither as much weight as the evaluation notes of Dr. Baffa.

First, Plaintiff cites statements made by Dr. Zepeda in his "statement under oath," a transcript of questions posed by Plaintiff's attorney and answered by Dr. Zepeda. (AR 3371–85.) Dr. Zepeda responded "Yes" when asked "Either [Plaintiff] has significant enough pain that he can't work . . . [o]r he takes opioid medication to control the pain, but then with the side effects of the medication, he can't work?" (AR 3375.) It is not clear from this statement that Dr. Zepeda is saying that Plaintiff is unable to work because of the side effects of medication, rather than that Plaintiff must chart an impossible course between too much pain and too much medication. Dr. Zepeda's other comments on the side effects from pain are fairly equivocal, such as that Plaintiff has "some" cognitive slowing and difficulty with memory, and that this "impacts" his work performance. (AR 3374.)

Even if the Court were to read Dr. Zepeda's statement to say that Plaintiff is unable to work because of cognitive side effects from his medications, this statement would not be entitled to great weight. Dr. Zepeda only made this statement in response to

specific questions by Plaintiff's lawyers. But in a letter written a year earlier, Dr. Zepeda opined that "pain medications have *slightly* disrupted [Plaintiff's] concentration and memory." (AR 551 (emphasis added).) The Court would give Dr. Zepeda's earlier, more specific finding more weight, and that finding does not show that the side effects are so significant as to prevent Plaintiff from working.

Second, Plaintiff cites a letter that was written by Dr. Bhatia to support Plaintiff's application for disability benefits. (AR 3386.) In that letter, Dr. Bhatia summarizes Plaintiff's medical history and opines that Plaintiff "cannot maintain concentration or mental focus due to high dose required narcotics" and cannot "function physically and mentally to be able to maintain employment of any type." (AR 3388–89.) It is unclear whether Bhatia derives this conclusion from his own observations or by interpreting the medical history he summarized.

Regardless, the Court gives more weight on this issue to the opinion of Dr. Baffa. Dr. Baffa is a clinical psychologist, his evaluation was focused on Plaintiff's cognitive abilities, and his notes documenting good cognitive ability were made contemporaneously and not later prepared specifically for Plaintiff's disability benefits application. Dr. Bhatia is a spinal surgeon, the basis of his conclusions on poor cognitive ability is unclear, and his letter containing those conclusions was prepared for Plaintiff's application.

Even if the conclusions of the two doctors can be reconciled, given that they occur at different points in time, cognitive disabilities would still not provide a basis to grant Plaintiff disability benefits. Because Plaintiff must be continuously disabled during the one-year Benefit Waiting Period, the Court's finding that Plaintiff was not cognitively disabled near the beginning of the Benefit Waiting Period (when Dr. Baffa saw him) precludes an award of disability benefits, even if Plaintiff was cognitively disabled by the time Dr. Bhatia saw him. (*See* AR 3770.)

Thus, based on the administrative record, the Court concludes that cognitive impairments from medication do not provide an additional basis to award Plaintiff disability benefits.

5. THE PLAN'S SUBJECTIVE SYMPTOMS LIMITATION

Though the Court concludes that Plaintiff is entitled to LTD benefits, the Court also concludes that Plaintiff is entitled to no more than 24 months of such benefits. The Plain contains a limitation for a disability "caused by, or contributed by," certain conditions, including "subjective symptom conditions." The Plan defines subjective symptom conditions as "any physical, mental or emotional symptom, feeling or condition reported by the employee or his physician which cannot be verified by tests, procedures or clinical examinations conforming to generally accepted medical standards," and the Plan lists pain as an example. The Plan only pays 24 months of benefits for disabilities covered by this limitation. (AR 3774.)

Plaintiff's disability falls under the subjective symptoms conditions limitation. Plaintiff's disability is "caused by, or contributed by" pain, which is specifically listed as a subjective symptoms condition in the Plan. Even Plaintiff argues that his disability is one that cannot be objectively measured. *See* Plaintiff's Reply Trial Brief, Dkt. No. 53, at 2 ("More fundamentally, Crawford submits that the nature and extent of his unrelenting, debilitating pain are not capable of objective measurement.").

Thus, Plaintiff is entitled to no more than 24 months of LTD benefits under the Plan.

DISPOSITION

The Court REVERSES the denial of Plaintiff's LTD claim and REMANDS to LINA for proceedings consistent with this opinion. The Court reaches this result after reviewing all arguments in the parties' papers. Any arguments not specifically addressed were either unpersuasive or not necessary to reach given the Court's holdings.

IT IS SO ORDERED.

DATED: October 7, 2014

Andrew J. Guilford
United States District Judge